

2009 JUN -8 AM 9: 48

**AVERY B. CHUMBLEY
MAKANI OLU PARTNERS LLC
363 WEST WAIKO ROAD
WAILUKU, MAUI, HAWAII 96793**

June 5, 2009

Laura H. Thielen, Chairperson
Ken C. Kawahara, Deputy Director
Commission on Water Resource Management
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Honolulu, Hawaii 96809

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Re: Avery B. Chumbley, Makani Olu Partners LLC response to objections of Hui
o Na Wai Eha and Maui Tomorrow Foundation, Inc. to SWUPA-E no. 2207

Dear Chairperson Thielen and Deputy Director Kawahara;

On May 26, 2009, Hui O Na Wai Eha and Maui Tomorrow Foundation, Inc. (collectively "MTF") filed objections to the above-referenced Surface Water Use Permit Application ("SWUPA") of Avery B. Chumbley, Makani Olu Partners LLC. Pursuant to H. Admin. R. § 13-171-18c, I hereby file and serve this response to the objections.

First it is not clear that MTF formally objected to the lack of prima facie evidence related to appurtenant rights on my application. Rather, MTF appears to be making a general comment about the information that was attached to permit applications and whether or not that information met MTF's expectations. If this was a formal objection then MTF failed to meet its obligations as the administrative rules require the applicant to be personally served with a copy of these objections. MTF failed to serve the applicant with its objections.

With that said, I still object to the assertion that the SWUPA process is the appropriate forum in which appurtenant rights are to be determined. Neither the State Water Code (H. Rev. Stat. Chapter 174C) nor the Hawaii Administrative Rules dealing with water use permits in water management areas (H. Rev. Stat. Chapter 171, Title 13) provide a basis by which the Commission can or should determine whether appurtenant rights exist in the context of a SWUPA. Specifically, Section 13-171-1 says that the purpose of the

applicable regulations is to establish administrative control over the withdrawal and diversion of surface water in threatened areas to ensure the most beneficial use, development and management of the water resources. The rules go on to tell us that "Nothing in this part shall be construed to deny the exercise of an appurtenant right by the holder thereof at any time." Section 13-171-27.

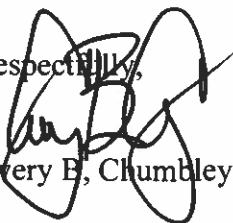
These provisions make clear that the Commission did not intend to address, determine or affect any claim of appurtenant rights under the Water Use Permit application process.

This position was confirmed through email exchanges I had with the Commission's staff, before I filed my SWUPA. I specifically asked the staff if I should attach certified copies of the Land Commission Awards, Royal Patents, Native Register, and foreign and native testimonies of the Land Commission where the appurtenant rights were established for my land. On April 1, 2009 Ed Sakoda told me that appurtenant rights were not the subject of a SWUPA and, as such, any documentation concerning appurtenant rights would be wholly irrelevant to the proceedings and should not be included with any submission. Mr. Sakoda further stated the question about whether a applicant believed that he had appurtenant rights was placed on the application simply for the Commission's information and possible future use.

The objection of MTF is an impermissible attempt to expand the scope of these proceedings, invites the Commission to exceed its powers under the SWUPA process, and invites the Commission to commit error. As such, this objection should be rejected.

Lastly I object to the statement "Chumbley who is an employee of Waiilatpu Water Company receives water for almost nothing or free." What I or anyone else pays for the cost of delivery of water to our land does not go to any issue that the Commission must determine if there are competing applications for water use permits. The issues are whether we are existing users, do we receive waters from the same sources, does the source provide sufficient water to accommodate all users, and whether our uses are reasonable and beneficial. Other issues are not relevant to this application.

Thank you for this opportunity to provide a response, should you need additional information please feel free to contact me.

Respectfully,

Avery E. Chumbley

Cc: Paul R. Mancini Esq., James W. Geiger Esq., Gilbert S. C. Keith-Agaran Esq.